IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 269, MISCELLANEOUS.

UNITED STATES OF AMERICA, PETITIONER,

v.

NATIONAL CITY LINES, INC., PACIFIC CITY LINES, INC., FIRESTONE TIRE & RUBBER COMPANY, GENERAL MOTORS CORPORATION, PHILLIPS PETROLEUM COMPANY, MACK MANUFACTURING CORPORATION, STANDARD OIL COMPANY OF CALIFORNIA, and FEDERAL ENGINEERING CORPORATION.

BRIEF OF NATIONAL CITY LINES, INC., AND OTHER RESPONDENTS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SOUTHERN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

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Petitioner seeks a review, by the extraordinary common law writ authorized under Section 1651(a) of Title 28, United States Code, of an interlocutory order entered October 28, 1948, by the United States District Court for the Southern District of California, Central Division. The order transferred this civil action instituted in that court to the United States District Court for the Northern District of Illinois, Eastern Division. The complaint in the action charges the respondents with violations of the Sherman Act.

Opinion Below.

The opinion of the District Court rendered on respondents' motions to transfer the action is reported in 80 F. Supp. 734. An opinion by this Court, and the two opinions by the District Court rendered at prior stages of the present civil action and a companion criminal proceeding, are reported respectively in 334 U. S. 573, 7 F. R. D. 393, and 7 F. R. D. 456.

Question Presented.

The Government seeks a writ of certiorari in order to have this Court review directly an order of the District Court transferring for trial to another district, under Section 1404(a) of Title 28, United States Code, as enacted by Public Law 773, 80th Cong., 2d Sess., a civil action under the antitrust laws. The question presented is whether the grant of the extraordinary common law writ is appropriate in this case to review an order, affecting only the place of trial, where the ground of attack is alleged error in the interpretation of a new section of a comprehensive statute.

Statutes Involved.

The Act of June 25, 1948, Public Law 773, 80th Cong. 2d Sess., which is entitled "An Act To revise, codify, and enact into law title 28 of the United States Code entitled 'Judicial Code and Judiciary'," provides in Section 1 that:

> "Title 28 of the United States Code, entitled 'Judicial Code and Judiciary' is hereby revised, codified, and enacted into law, and may be cited as 'Title 28, United States Code, section —', as follows:
>
> . . . . . .

§ 1404. Change of venue

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions agreeable to the usages and principles of law."

Section 12 of the Act of October 15, 1914, 38 Stat. 730, 15 U. S. C. 22, known as the Clayton Act, provides as follows:

"Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.".

Statement.

Prior Proceedings.

On April 9, 1947 a criminal indictment was returned in the District Court for the Southern District of California against National City Lines, Inc. (sometimes called National) and the seven other corporate defendants named in this civil action (together with seven individuals, officers of some of the corporate defendants). The complaint in the present companion civil action was filed the next day. The transactions complained of and the charges made

in the indictment and in this civil action are substantially the same. On July 14, 1947 motions were presented to the District Court by all the defendants to transfer the criminal proceeding to the United States District Court for the Northern District of Illinois, Eastern Division (Chicago), pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure,[1] and on August 14, 1947 the District Court rendered a written opinion (7 F. R. D. 393) and entered an order determining that "in the interest of justice" the proceeding should be transferred for trial to Chicago. Defendants have pleaded not guilty and the criminal case has been directed to be tried in Chicago on February 14, 1949. The Government did not attempt to appeal or seek a review by this Court of the order transferring the criminal proceeding for trial in Chicago.

Prior to the decision of the District Court transferring the criminal proceeding, all the defendants had moved to dismiss the present civil action on the ground that the California court was an inconvenient and inappropriate forum. The District Court entered an order on October 15, 1947 dismissing this action, holding that under the doctrine of *forum non conveniens* it had the power to dismiss the action and that the unusual facts of the present case required dismissal of the action "in the interest of justice". The judgment of dismissal was reversed on appeal to this Court (*United States v. National City Lines, Inc.*,

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[1] Rule 21(b) provides: "Offense Committed in Two or More Districts or Divisions. The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged." (18 U. S. C. A. foll. Sec. 687.)

334 U. S. 573), a majority of this Court holding that "*the history of antitrust legislation shows an intent not to limit the choice of forum by the application of the doctrine of forum non conveniens*" and that the venue provisions of the antitrust laws "stand proof" against interference of the application of the doctrine of *forum non conveniens*, although not impregnable to the legislative power of Congress.[2] This Court's decision was rendered June 7, 1948, prior to the approval by Congress on June 16, 1948 of the new Judicial Code.

Present Transfer Order and Opinion of District Court.

Pursuant to notices filed on August 5, 1948, respondents moved the District Court on September 20, 1948 to transfer the civil action to the United States District Court for the Northern District of Illinois.[3] The District Court held that (1) Section 1404(a) was applicable to an action under the antitrust laws, and (2) the unusual facts of the present case called for the exercise by that court of its discretionary power.[4] The Government does not question the propriety of the exercise of discretion assuming that

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[2] See opinion of Judge Yankwich below, 80 F. Supp. 734, 740.

[3] The motion to transfer is set forth in the Appendix to the Government's petition for certiorari (Exhibit A, p. 19-20).

[4] 80 F. Supp. 734, 742. In addition to *Collett* v. *Louisville & Nashville RR. Co.*, 17 U. S. Law Week 2223 (E. D. Ill., Oct. 18, 1948), and *Kilpatrick* v. *Texas & Pacific Ry. Co.* (S. D. N. Y., Nov. 22, 1948), now pending before this court, the District Courts in *Hayes* v. *Chicago, R. I. & P. R. Co.*, 79 F. Supp. 821; *Nunn* v. *Chicago, Milwaukee, St. P. & P. R. Co.*, 80 F. Supp. 745; *White* v. *Thompson*, 80 F. Supp. 411; *Chaffin* v. *Chesapeake & O. Ry. Co.*, 80 F. Supp. 957, and *Richer* v. *Chicago, R. I. & P. R. Co.*, 80 F. Supp. 971, all involving actions under the Federal Employer's Liability Act, gave effect to the language of the section and held that it applied to all civil actions. *Contra, Pascarella* v. *New York Cent. R. Co.*, 81 F. Supp. 95.

the section is applicable to anti-trust proceedings[5] (Brief, p. 9).

The District Court supported its interpretation of Section 1404(a) by the following observations, among others: The section is part of "a revision of the entire Judicial Code, the first one attempted since 1911". The revision "created a new procedural scheme, namely a method of transferring cases from one district to another, which did not exist before". The broadest possible language—"any civil action"—was used. The legislative history of the section, including statements before the Sub-committee of the House Judiciary Committee, confirms that "Section 1404 introduces an element of convenience which gives the court the power to transfer the case for the convenience of parties and witnesses to another district." The reviser's note to the section manifests an intention "to apply the provisions, *except where otherwise indicated, to all civil actions*, of whatever nature." "Whenever, in this revision, the Congress intended either the whole revision or a specific provision in it, *not* to apply they made specific exceptions from the generic phraseology." Section 12 of the Clayton Act, as to where an action "may be brought", does not immunize antitrust actions "against a general transfer enactment of the type under consideration, as the Court has held it protects it from the impact of the doctrine of *forum non conveniens*." "The doctrine of

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[5] In its opinion in the companion criminal case the District Court said (7 F. R. D. 393, 402):

> "But I am satisfied that a trial here would impose *unnecessary hardships on the defendants* and entail unjustifiable expense which it is the object of the new rules of criminal procedure, and especially of the rule under discussion, to avoid. Altogether *the facts spell out the vexatiousness and oppressiveness* which the Supreme Court has warned us to eschew in matters of this character." (Emphasis supplied.)

implied repeal [of Section 12] need not concern us" since Section 1404(a) "merely subjects the choice [of forum] to judicial qualification under definite conditions".[6]

The District Court found (par. 13): "The convenience of the parties and witnesses and the interest of justice require that this suit be transferred to the United States District Court for the Northern District of Illinois, Eastern Division".[7]

The order of the District Court transferring this civil action has been stayed until twenty days after this Court shall have taken final action on this petition.

Section 1404(a) and Its Legislative History.

House Report No. 308, accompanying the bill which, with certain amendments, became Public Law 773, contained as an appendix copious Reviser's Notes "keyed to sections of the revision" and designed to "explain in detail every change made in text."[8] The Reviser's Note with respect to Section 1404(a) is as follows:

> "Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper. As an example of the need of such a provision, see *Baltimore & Ohio R. Co.* v. *Kepner*, 1941, 62 S. Ct. 6, 314 U. S. 44, 86 L. Ed. 28, which was prosecuted under the Federal Employer's Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the court to determine that the

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[6] 80 F. Supp. 734, 736, 737, 738, 742, footnote 31.

[7] An authenticated copy of the findings of fact and conclusions of law of the court below has been filed with this Court.

[8] H. Rep. No. 308 accompanying H. R. 3214, 80th Cong. 1st Sess., Apr. 25, 1947. (Tit. 28, U. S. Code Congressional Service, p. 1692, 1699).

transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so."

The plan for a comprehensive revision of Title 28 originated in 1943 with the House Committee on Revision of the Laws. This committee retained two law publishing companies experienced in preparation of annual supplements to the United States Code and the revision was supervised by a staff of expert revisers headed by a former chief of the Appellate Section, Criminal Division, Department of Justice,[9] an Assistant United States Attorney,[10] and a well known author.[11] The Committee had the benefit of the advice of an advisory committee of well known jurists, attorneys and law professors,[12] and two special consultants, experienced in the preparation of the Federal Rules of Criminal and Civil Procedure,[13] as well as a committee of the Judicial Conference[14] and

[9] William W. Barron.

[10] Frank J. Parker, Asst. U. S. Attorney, E. Dist. N. Y.

[11] Theodore W. Graske.

[12] Floyd E. Thompson, former Chief Justice, Illinois Supreme Court; Justin Miller, former Associate Justice, U. S. Court of Appeals, District of Columbia; John B. Sanborn, Judge, U. S. Court of Appeals, 8th Circuit; John J. Parker, Senior Judge, U. S. Court of Appeals, 4th Circuit; Walter P. Armstrong, former President American Bar Association; John Dickinson, professor, Univ. Penn. Law School, former U. S. Asst. Attorney General.

[13] Alexander Holtzoff (now U. S. District Judge, then Special Assistant to the Attorney General, former Secretary of Supreme Court Advisory Committee on Federal Rules of Criminal Procedure) and James W. Moore, professor of Law, Yale University (Chief Research Assistant to Committee on Rules of Civil Procedure; author of Moore's Federal Practice).

[14] Chief Justice Stone, acting for the Judicial Conference, appointed Albert B. Maris, Judge, United States Court of Appeals, Third Circuit, William F. Smith, Judge, United States District Court, New Jersey, and Clarence G. Galston, Judge, United States District Court, Eastern District, New York, as an Advisory Committee to represent the Judicial Conference.

a committee of Supreme Court Justices.[15] Initial drafting was done by the revisers and the two law publishing companies. Each of the four drafts, together with Reviser's Notes, was submitted to the advisory committee, the Judicial Conference committee, and the special consultants to the Judiciary Committee of the House, and circulation was made generally among the judiciary, members of Congress, Government agencies, United States Attorneys, bar associations and interested members of the legal profession.[16] After circulation in each case, the drafts were considered at conferences of the committees and consultants held in February, May and December of 1945 and April of 1946, at which times the drafts were reviewed section by section in the light of questions which had arisen during their preparation.[17] Thereafter, the members of the House Judiciary subcommittee and its legal staff went over the legislation section by section, "and line by line and word by word", to resolve every possible question.[18]

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[15] Chief Justice Stone appointed a Committee consisting of himself as chairman and Associate Justices Douglas and Frankfurter to cooperate with the revisers on material having to do with the Supreme Court.

[16] Statement of Congressman Eugene J. Keogh before Subcommittee No. 1 of House Judiciary Committee, Hearings on H. R. 1600 and H. R. 2055, March 7, 1947 (hereinafter referred to as "Hearings") (Tit. 28, U. S. Code Congressional Service, p. 1940, 1947-48). The work of revision of Title 28 was begun by the House Committee on Revision of the Laws, of which Congressman Keogh was chairman. The functions of this committee became the responsibility of the House Judiciary Committee under the Legislative Reorganization Act but only after the first bills incorporating the revision (H. R. 3498 and H. R. 7124) had been introduced in the 79th Congress by Rep. Keogh (June 9, 1945; July 24, 1946). H. R. 2055 was introduced as a successor bill in the 80th Congress, and it was, in turn superseded by H. R. 3214, which, with amendments, became Public Law 773.

[17] Statement of Justin Miller, Hearings, *id.* at pp. 1950, 1952.

[18] Statement of Congressman Eugene J. Keogh, Hearings (comment of Hon. John M. Robison, chairman, House Judiciary Committee), *id.* at p. 1948.

Section 1404(a) appeared for the first time in the second draft of the revision. It was then accompanied by a Reviser's Note which stated:

> "Subsection (a) is new. It was drafted in accordance with a memorandum of Mar. 7, 1945, from the author of Moore's Federal Practice, stating that recognition should be given the doctrine of *forum non conveniens* permitting transfer to a more convenient forum, even though the venue is proper. The author gave as an example for the need of such a provision *Baltimore & Ohio R. Co.* v. *Kepner*, 1941, 62 S. Ct. 6, 314 U. S. 44, 86 L. Ed. 28, which was prosecuted under the Federal Employer's Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so."

The memorandum of Professor James W. Moore referred to reads:[19]

> "Improper venue results in the dismissal of an action in the federal courts if the point is timely made. I think this result can no longer be justified in this era of easy communication and travel. Provision should be made for transfer when an objection of improper venue is sustained, probably with the imposition of costs and possibly a reasonable attorney's fee. Then I believe we should go further and give some recognition to the doctrine of *forum non conveniens* and permit a court to transfer the case, even though the venue is proper, to a more

[19] At the request of counsel for respondents, Professor Moore has kindly supplied a copy of this memorandum and consented to its use in this brief.

convenient forum. *In my opinion the District Court for the Eastern District of New York should have had the power in the situation presented in the Kepner case, 314 U. S. 44, 62 S. Ct. 6, to transfer the action under the Federal Employer's Liability Act to a federal court in Ohio where the accident occurred and the employee resided and which would have been a proper venue.*" (Emphasis supplied.)

In the third draft, the section was retained, and the Reviser's Note appeared in the final form set forth at page 7 hereof prefaced by the sentence: "Subsection (a) is new." Both the section and the Note were circulated in the third and fourth drafts in 1945 and the early part of 1946, and they were contained in H. R. 7124, introduced July 24, 1946, but not acted upon by the 79th Congress. With minor changes this bill was introduced in the 80th Congress as H. R. 2055; it was referred to the House Judiciary Committee and a hearing was held upon it March 7, 1947.

While the various drafts of the new Code and corresponding Reviser's Notes were given the widest circulation over a two year period, there is no indication that the broad scope of Section 1404(a) or the intention to codify the doctrine of *forum non conveniens* for general application was questioned, or was in any way the subject of controversy.

At the hearing before a Subcommittee of the House Judiciary Committee, Professor Moore, Special Consultant to the Revision Staff, made the following statement concerning changes incorporated in the revision which he regarded as "fairly important":

"VENUE

Venue provisions have not been altered by the revision. Two changes of importance have, however,

been made. Improper venue is no longer grounds for dismissal of an action in the Federal courts. Instead the district court is to transfer the case to the proper venue. See section 1406. And section 1404 introduces an element of convenience which gives the court the power to transfer a case for the convenience of parties and witnesses to another district. Both of these changes were in line with modern State practice; and the provision for change of venue on the grounds of convenience is also embodied in the Bankruptcy Act for corporate reorganization, section 118, Eleventh United States Code, section 518."[20]

Section 1404(a) and the Reviser's Note were carried in their present form in H. R. 2055, and its successor bill, H. R. 3214, from introduction in the House, April 25, 1947, through the Senate amendments (reported out June 9, 1948), and concurrence by the House in the Senate amendments on June 16, 1948. By its terms, Public Law 773 became effective September 1, 1948.

In November 1941, which was prior to the time the revision was undertaken, this Court decided in *Baltimore & Ohio RR. Co.* v. *Kepner*, 314 U. S. 44, that in a suit under the venue provisions of the Federal Employer's Liability Act, a court was, in view of the legislative history of such provisions, precluded from applying the doctrine of *forum non conveniens*. The decision of the District Court (7 F. R. D. 393) in the present action, holding that antitrust actions were subject to the doctrine of *forum non conveniens* (later reversed by this Court), was handed down on October 15, 1947. The work of the Committees and the revisers on the provisions of the new Judicial Code was

[20] Tit. 28 U. S. Code Congressional Service, p. 1969.

finished by the Spring of 1947. Thus, the prime example before them of the principle sought to be affected by Section 1404(a) was the *Kepner* case; the decision in the present case with respect to actions under the anti-trust laws was not handed down until after the work of revision had been completed. The opinion of this Court was not handed down until eight days before the approval of the Act on June 16, 1948. We make these comments because the Government argues that there is some importance in the failure of the Reviser's Notes to refer to the prior decision of this Court, or of the lower court, on the applicability of the doctrine to antitrust actions, an argument to which we will refer at greater length hereafter.

SUMMARY OF ARGUMENT.

I.

The Government is seeking an extraordinary writ in the face of a statutory pattern providing for an appeal only from final judgment. The present case, merely determining that a trial should be held before a Federal District Judge in Illinois instead of a Federal District Judge in California, after a finding by the California court that such transfer was in the interest of justice, is not of such exceptional character and critical public importance as to call for the extraordinary remedy.

A review of the cases in which this Court has utilized the writ reveals that its granting has depended upon an issue of importance so great that failure to grant the writ might have resulted in a frustration and breakdown of the inter-relationship and functioning of some signifi-

cant part of our Federal and constitutional system, such as a question of division of authority between the Federal courts and the State courts[21]; whether a Federal court or another federal department had jurisdiction[22]; the failure of the judicial machinery to function by reason of the wrongful usurpation of power[23]; the arbitrary refusal to exercise a patently existing power[24]; or the denial of the right to a trial by jury[25].

There exists here no showing of importance comparable to the rare cases where the writ has been granted. The District Court relied upon a statute specific in its terms and supported by a Reviser's Note and a legislative history showing an unmistakable purpose to allow the transfer of civil actions in the interest of justice. In essence the Government challenges the interpretation of the statute by the District Court, thus presenting at best a question of error by the lower court.

II.

While in the past a court might infer from the legislative background of a special venue statute an intention on the

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[21] See *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 31 (footnote 5); *Re Chetwood*, 165 U. S. 443; *Ex Parte Metropolitan Water Co.*, 220 U. S. 539.

[22] See *U. S. Alkali Export Association Inc.* v. *United States*, 325 U. S. 196; *Ex Parte Peru*, 318 U. S. 578.

[23] See *De Beers Consolidated Mines, Ltd.* v. *United States*, 325 U. S. 212; cf. *McCullough* v. *Cosgrave*, 309 U. S. 634.

[24] See *Ex Parte United States*, 287 U. S. 241; *McClellan* v. *Carland*, 217 U. S. 268.

[25] See *Adams* v. *U. S.*, 317 U. S. 269; *Ex Parte Simons*, 247 U. S. 231.

part of the legislature that the selection of venue should not be qualified under any circumstances by the doctrine of *forum non conveniens,* there is now an express *statutory purpose* to give full scope to the doctrine and to embrace within the "power of transfer" any and every civil action. The Government's brief itself recognizes that the section extends the scope of the doctrine of *forum non conveniens* and that it now applies to some special venue provisions, but argues that "any civil action" still must be limited to those actions "as to which the applicable venue provisions are codified by Public Law 773" (Brief, p. 8). This argument defies the plain language of Section 1404(a) and its underlying purpose as unequivocally shown by the Reviser's Note and the legislative history. Only some —but not all—special venue provisions are codified in the Revised Code; the special venue provisions of the Federal Employers' Liability Act are not codified; and nothing could be clearer from the Reviser's Note than the purpose that any civil action, including one brought under the Federal Employers' Liability Act which is referred to "as an example," should be subject to the equitable doctrine.

Section 1404(a) merely relates to the place of trial and does not effect any change in substantive law. No question is presented as to the repeal of Section 12 of the Clayton Act which merely provides different venues in which an action "may be brought." The doctrine of *forum non conveniens* was designed as "an instrument of justice." Section 1404(a) is in keeping with the growing trend of transferring a case for trial "in the interest of justice." There is a parallel rule in the Federal Rules of Criminal Procedure (Rule 21(b)), the history of which shows conclusively that

it was intended to apply to anti-trust actions[26]. Applicability of Section 1404(a) to antitrust actions will not create any serious obstacle in the enforcement of the anti-trust laws. A great burden will rest upon any defendant, in a suit instituted under the antitrust laws, to convince a court that it should exercise the transfer power granted, and there is no reason to assume that the power will be abused.

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[26] The history of the rule is set forth by Judge Yankwich in his opinion on the transfer of the companion criminal proceeding. See *United States* v. *National City Lines, Inc.*, 7 F. R. D. 393, 396-97. The following statement was made by the late Judge George Z. Medalie, a member of the advisory committee on the Federal Rules of Criminal Procedure (*id.* at p. 396):

> "Think of what else we have done. It is really a scandal in the Federal Administration, the frequent robbing of the Southern District of New York of its rightful jurisdiction. All large scale financial or business crimes are committed in the Southern District of New York, and they ought to be tried elsewhere; and I feel as you would have with me, if you had preceded me in office—you take these anti-trust cases and other cases involving business operations where indictments are found by the government—a man is blissfully attending to his business in Chicago, committing this, that or the other crime, or doing this, that, or the other good deed, depending on his outlook; and he finds he must go down somewhere in New Mexico, because since his business is nationwide, you can pick out any jurisdiction in the country and indict him there.
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> * * * * * * *
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> "If, for example, a business' headquarters are in Chicago, everybody is there; every book and record is there, practically every witness is there on both sides, then try it in Chicago. That is the decent thing to do and accords better with the dignity of our great government that it be done that way, rather than the shabby devices indulged in where we lose our status and our self-respect. Government attorneys cannot, if they appraise themselves properly, afford to engage in that kind of thing, and perhaps it will diminish the abuse, if in fact, it doesn't succeed in its complete abolition."

ARGUMENT.

I.

The present case, involving only the place of trial, is not of such exceptional character and critical public importance as to call for the extraordinary remedy sought.

This Court has repeatedly held that the common law writs are to be reserved for "really extraordinary causes"; they are to be issued "sparingly," in connection with "matters of gravity and public importance." *Ex Parte Fahey*, 332 U. S. 258, 260; *Re Chetwood*, 165 U. S. 443, 462; *Ex Parte United States*, 287 U. S. 241, 248-49.

While the common law writs have been applied for with great frequency to this Court, Chief Justice Stone pointed out in *Ex Parte Peru*, 318 U. S. 578, 585, Note 4, that during the period 1925 to 1943 the Court found circumstances justifying their issuance in *less than ten cases*.

Section 1651(a) of the revised Judicial Code represents a rephrasing of Section 262 of the prior Code which, according to the Reviser's Note, is "expressive of the construction" placed upon Section 262 by this Court in *United States Alkali Export Association, Inc.* v. *U. S.*, 325 U. S. 196, and *DeBeers Consolidated Mines, Ltd.* v. *U. S.*, 325 U. S. 212.[27] These cases, upon which the Government primarily relies, are essentially different from the present case.

The *Alkali* case involved an asserted conflict between a federal district court and the Federal Trade Commission, in the enforcement of the antitrust laws. The question presented was whether *any* court—not merely the court in a particular district—should hear the case. Beyond this,

[27] Tit. 28 U. S. Code Congressional Service, pp. 1867.

petitioners might have been irreparably damaged by the inability to purge themselves of antitrust violations under the guidance of the Commission, without being subjected to the penalties of the Sherman Act. Emphasizing the extraordinary character of the common law writ, Chief Justice Stone justified issuance in that case by analogy to cases involving fundamental questions concerning the operation of the federal system, such as the interference by federal officials with the enforcement of state laws, and by reference to cases involving basic principles of justice, such as deprivation of trial by jury. (325 U. S. 196, 204.)

In the *DeBeers* case, a civil action under the Sherman Act, the District Court granted a preliminary injunction restraining the defendants from disposing of any property pending trial. There was no statutory basis and no precedent for so doing. A majority of the Court granted certiorari on the ground that the action of the District Court was "not mere error, but usurpation of power", "no redress from which could be had by a decision on the merits. (325 U. S. 212, 217). Justice Douglas (joined in by Justices Black, Murphy and Rutledge) vigorously dissented on the ground that such an interlocutory order, even though beyond the power of the lower court, should be reviewed only by the appeal machinery provided, saying (p. 225):

> "In other words, we look to the merits and take the case under § 262 if it appears that the District Court exceeded its authority. But it always exceeds its authority when it abuses its discretion. Thus we must now entertain these appeals on interlocutory orders, though Congress said we should not, in order to determine whether the District Court kept within bounds. Certainly Congress knew that some interlocutory orders might be erroneous when it chose to make them non-reviewable. It did not draw the dis-

tinction now suggested between interlocutory orders which are an abuse of conceded judicial power and interlocutory orders which otherwise exceed judicial authority. Congress moreover knew that if immediate review of interlocutory orders could not be had, no decision on the merits might be able to 'redress any injury done by the order'. But that was the choice which it made. We should respect it."

This case, involving only the place of trial, differs not at all in principle from the great number of cases where this Court has consistently denied use of a common law writ as a means of reviewing an order denying a motion to remand a cause from a federal to a state court.[28]

In *Ex Parte Roe*, 234 U. S. 70, this Court denied mandamus to compel the remand of a cause to a Texas court even though it was recognized that removal of the action under the general removal statute might have been erroneous in view of the special venue provisions of the Federal Employers' Liability Act. Similarly in *U. S. v. Rice*, 327 U. S. 742, the United States had procured removal to a federal court of an action pending in an Oklahoma court to which a restricted member of the Five Civilized Tribes was a party under the special provisions therefor contained in the Act of April 12, 1926 (44 Stat. at l. 329). The federal court thereafter granted remand under the general authority to remand "any cause". This Court denied mandamus pointing out that Congress had repealed an earlier statute permitting appeals from orders of remand for the express purpose of confining review to appeal from the final judgment and holding that the United States must abide, as any ordinary litigant, with the appeal machinery provided. A like purpose to repeal interim appeal provisions and pre-

[28] See *Roche* v. *Evaporated Milk Association*, 319 U. S. 21, 30-31, and cases cited.

clude review of interlocutory orders motivated passage of the Expediting Act.[29]

Justice Brandeis, discussing appellate practice prior to passage of the Expediting Act in *U. S. v. California Cooperative Canneries*, 279 U. S. 553, stated (p. 558):

> "These provisions governing appeals in general were amended by the Expediting Act so that in suits in equity under the Anti-Trust Act 'in which the United States is complainant', the appeal should be direct to this court from the final decree in the trial court. Thus, Congress limited the right of review to an appeal from the decree which disposed of all matters, (see *Collins v. Miller*, 252 U. S. 364, 64 L. Ed. 616, 405 S. Ct. Rep. 347) and it precluded the possibility of an appeal to either court from an interlocutory decree."[29]

The present transfer order, supported by a well-reasoned opinion, should not be subjected to review by issuance of a prerogative writ, in the nature of mandamus as if the District Judge had blatantly usurped power to transfer the cause, without color of authority, or had declined to act in any measure when under a clear duty to exercise jurisdiction. As stated by Justice Cardozo in *Interstate Commerce Commission* v. *U. S.*, 289 U. S. 385, 394:

> "Mandamus is an appropriate remedy to compel a judicial officer to act. It may not be used as a substitute for an appeal or writ of error to dictate the manner of his action." (See also *Roche* v. *Evaporated Milk Association*, 319 U. S. 21, 26)

In this case the purported justification for the writ is that (1) the question of transfer to a different district will

[29] See also *Allen Calculators, Inc.* v. *The National Cash Register Co.*, 322 U. S. 137; *Roche* v. *Evaporated Milk Association*, 319 U. S. 21; *Cobbledick* v. *U. S.*, 309 U. S. 323; *Alexander* v. *U. S.*, 201 U. S. 117.

plague litigants and courts until the matter has been settled by the Supreme Court; (2) the transfer order will frustrate the intent of Congress to give the Government an absolute venue privilege; and (3) petitioners have no adequate remedy by appeal.

The present case is sought to be given importance by reference to other pending antitrust cases. The Government's real concern appears to be not with the particular matter of transfer in this case but with obtaining an accelerated interpretation of Section 1404(a) for use in connection with the other pending cases. It appears that the present case, involving unusual hardship to the defendants, is the only anti-trust case which has been transferred under Section 1404 (a), the government not questioning the discretion of the Court in making such transfer under the present facts. In any event, such considerations have never been held to justify issuance of the writ. Traditionally, this Court has refused, in order to serve the convenience of a party, to permit use of the writ as a substitute for an appeal, and the Government, as other litigants, has been held subject to the rules governing appeals. *U. S.* v. *Rice*, 327 U. S. 742; *Whitney* v. *Dick*, 202 U. S. 132.

The alleged error in transferring the present case does not differentiate it from any other case in which a federal statute may have been erroneously applied. Even if there were error in failing to give effect to the intent of Congress, such error could be cured on a direct appeal from a final judgment. The Government argues (Brief, p. 12) that if it successfully raised the question of venue on an appeal by it from a judgment on the merits in favor of the defendants, it would be necessary for the action to be retried *ab initio* in the California court. Surely it cannot seriously be contended that this Court would be powerless, on appeal,

to correct any ruling found to obstruct Congressional purpose, without compelling needless remand for a new trial.

Finally, the argument of petitioner that this order will cause disruption of its staff, and expense and delay is an attempt to reargue the merits of the motion below. The District Court subjected the application of defendants for a transfer to eight different tests before finding that justice required transfer of the cause.[30] Any hardship or inconvenience to the Government was carefully considered by the court below in determining that defendants established the necessity for a transfer to another district "for the convenience of parties and witnesses, in the interest of justice."[31] Certainly it was never contemplated that such hardship should be the basis for the issuance of a common law writ. Indeed, such an argument was rejected by Chief Justice Stone in *Roche* v. *Evaporated Milk Association*, 319 U. S. 21, 30, and such arguments have been consistently rejected in refusing to review by issuance of the common law writs the denial of a motion for non suit[32] and the denial of a motion to remand a cause from a federal to a state court.[33]

The Government attempts to borrow from the public interest involved in the enforcement of the antitrust laws an urgency and importance of fundamental legal principle

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[30] See *United States* v. *National City Lines, Inc.*, 7 F. R. D. 393, 398 (applying same tests on transfer of the criminal case).

[31] Any possible hardship or inconvenience to the Government has already occurred in view of the accomplished transfer of the criminal case to Chicago where the case is to be tried on February 14.

[32] *Ex Parte Loring*, 94 U. S. 418; and see *Re Chicago, R. I. & P. R. Co.*, 255 U. S. 273 (denying a plea to the jurisdiction); *cf. Ex Parte Perry*, 102 U. S. 183.

[33] *Ex Parte The Park Square Auto Station*, 244 U. S. 412; *Ex Parte Harding*, 219 U. S. 363; *Re Pollitz*, 206 U. S. 323.

which this case does not possess. This case satisfies none of the tests established by this Court for the issuance of the common law writs.[34]

In all equity and good conscience,[35] and in accordance with the usages and principles of law, petitioner should be remitted to its statutory remedy of appeal from the final judgment.

II.

The decision of the District Court that Section 1404(a), in view of its language and legislative history, is applicable to any civil action and that an antitrust action is not immunized is clearly proper.

The illogical nature of the Government's contention that Section 1404(a) has application only to actions arising under the venue provisions of Chapter 87 of the Code is indicated by the inconsistent positions it has taken. In its original petition it stated (p. 17) that the section was in-

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[34] Referring to the cases cited by the Government as authority for the statement that this court has frequently reviewed alleged failure of an inferior court to exercise power of adjudication imposed upon it by law (Brief, p. 10), *Ex Parte Simons*, 247 U. S. 231, and *Ex Parte Skinner & Eddy Corp.*, 265 U. S. 86, involved deprivation of trial by jury; *Ex Parte United States*, 287 U. S. 241, involved refusal by a district judge to issue a warrant of arrest after the return of an indictment; in *Ex Parte Peterson*, 253 U. S. 300, the writ was denied; in *McCullough* v. *Cosgrave*, 309 U. S. 634, the writ was granted to correct persistent disregard of the Federal Rules of Civil Procedure; and in *Ex Parte Kawato*, 317 U. S. 69, abatement of the suit below would have defeated the appellate jurisdiction of this Court.

[35] "Mandamus is an extraordinary remedial process which is awarded not as a matter of right, but in the exercise of a sound judicial discretion. Although classed as a legal remedy, in issuing it a court must be largely controlled by equitable principles." (Justice Taft, *In the Matter of The Skinner & Eddy Corp.*, 265 U. S. 86, 95-96).

tended "to have the valuable but noncontroversial effect of giving to the district courts, in cases where the doctrine of *forum non conveniens* was previously applicable, power to transfer the action to another district, in substitution for the more drastic remedy of dismissing the action upon the ground of the inconvenience of the forum". Apparently realizing that such an arbitrary limitation was without foundation, the Government in its brief shifts its ground to an equally illogical position (p. 8)—that the purpose of Section 1404(a) is that "the doctrine of *forum non conveniens* applies to any civil action as to which the applicable venue provisions are codified by Public Law 773, whether or not these venue provisions are derived from a special venue statute". This present position of the Government defies the plain, broad language of the section. It excludes from the application of the section a considerable number of venue provisions respecting important matters. It disregards the fact that the statute is part of a complete revised code and not merely the codification of an existing law and that it is part of the embodiment of a new procedural scheme. It is in direct contradiction of the clear language of the Reviser's Notes. It would frustrate the fair meaning of various sections of the Code other than Section 1404(a) and would in reality defeat the principal purpose of the enactment.

A.

Language and Framework of the Section.

It is impossible to conceive of any broader language than "any civil action". The phrase used in Section 1404(a), and in many other sections of the new Code, in substitution for such phrases as "all cases", "all suits at law or in equity", and similar phrases, was plainly intended

to embrace all actions, suits, and proceedings. This is apparent from the various sections of the Code and the Reviser's Notes. The same phrase is found in many sections, including Section 1337 (giving the District Courts original jurisdiction "of any civil action" arising "under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies"). The Reviser's Notes to Section 1337 state that the words "civil action" were substituted for "suits"; and certainly "any civil action" in Section 1404(a) must have the same broad meaning as in Section 1337. As appears from Section 1404(b) itself, "any civil action" was intended to be coextensive with "any action, suit or proceeding of a civil nature".

When an exception from the general terms of a chapter or the Code itself was intended, specific provision was made to cover the excepted cases. For example, in Chapter 171, governing "Tort Claims Procedure", specific provision was made to except thirteen different classes of actions against the Government and government agencies from the general coverage of the chapter (Section 2680). Had any exception from the terms of Section 1404(a) been intended, a proviso to that effect could easily have been inserted. In view of the word by word scrutiny which the various drafts of the revision (and the Reviser's Notes) underwent at the hands of expert consultants and advisers, any suggestion that an exception was intended but overlooked can carry no weight.

In addition, Section 33 of Public Law 773 is significant. It provides that no "inference of a legislative construction is to be drawn by reason of the chapter in Title 28 * * * in which any section is placed, nor by reason of the catchlines used in such title." Section 1404 represents an all-embracing concept dealing with the transfer of cases. In seeking to limit the actions embraced by Section 1404 of

the Code to the particular venue provisions set forth in Sections 1391 to 1403, despite the fact that Section 1404(a) refers to "any civil action," the Government seeks arbitrarily to restrict Section 1404(a) by reference to other sections in Chapter 87 which happen to deal with venue. This is inconsistent with the purpose and intention of Section 33.

B.

Scope of Revision and Reviser's Notes to Section 1404(a).

(1) The Government argues that the only changes intended by the revision were "minor, technical, and noncontroversial" (Brief, p. 29).

It is unreal and unsound to suggest that the new Code effected no significant changes. While it does not deal with matters of substantive law, inevitably a revision so sweeping and comprehensive effected material changes of a procedural nature. The Code sets forth a comprehensive procedural scheme. The change with which we are concerned is of a procedural nature.

In addition to Section 1404(a), a number of important venue changes were made; there were material changes permitting for the first time actions against aliens to be laid in any district (Sec. 1391(d)) and that the Collector of Internal Revenue may sue to recover taxes in the district where the return was filed (Sec. 1396). In this chapter also, the venue provisions for actions relating to orders of the Interstate Commerce Commission were "completely rewritten to give effect to changes recommended by the Judicial Conference of the United States" (Sec. 1398). And provisions for transfer of proceedings from one division of a district court formerly applicable only to the District of Maine, were extended to apply nationally (Sec. 1404(b)). Professor Moore points out, also, that the venue of a patent infringement action "may be considerable broadened" under the

redefinition of corporate residence contained in Section 1391(c). (3 Moore's Federal Practice 2140.)

Section 1404(a) is part of a new concept for treating improper or inconvenient venue. The first consideration was to avoid the dismissal of actions brought in the *wrong* venue by conferring upon district courts the power to transfer actions to other districts. The second consideration was to codify the principle of *forum non conveniens*, avoiding the limitations placed upon the doctrine by the *Kepner* case, and establishing uniform standards governing the transfer of actions. These principles have been enacted into law as Sections 1406(a) and 1404(a) of Title 28, and constitute a completely new scheme for the handling of improper or inconvenient venue.[36] The sections comprise a development of the law, fitting the words of Justice Cardozo that "The law, like the traveler, must be ready for the morrow. It must have a principle of growth."[37]

It does not appear that there was any controversy among the revisers, consultants, or Judiciary Committee members concerning changes made in the course of the comprehensive revision. Any suggestion that the present change may have been "controversial", from the viewpoint of persons other than those who participated in the revision, can have no force in view of the impact of the plain language of the section and the Reviser's Note. The remark of Congressman Keogh as to "controversial changes", cited in the Government's brief (p. 21), merely states that an attempt was made to avoid "controversial substantive changes".

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[36] See memorandum of Professor Moore, *ante* p. 10. Section 1406(a) reads: "The district court of a district in which is filed a case laying venue in the wrong division or district shall transfer such case to any district or division in which it could have been brought." This section first appeared in the revised code as subsection (d) of section 1404 (see Fourth Draft, Feb. 1946, p. 278).

[37] Cardozo, *The Growth of the Law* (1927), p. 20.

The change with which we are concerned was clearly of a procedural, not a substantive, nature. Further, there was no reason at that time to anticipate that repudiation of the *Kepner* limitation would arouse controversy. The fact that the revisers anticipated no later objection to a change does not alter the fact that this and other significant changes were made.[38]

A federal codification of the doctrine of *forum non conveniens* had gained favor, even enthusiasm in the profession[39] and the FELA venue section plus the rule of the *Kepner* case was widely blamed for the undue transportation of actions under the Federal Employer's Liability Act.[40] There is no justification for any inference that the

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[38] For example, Section 2283 of the Code was designed to eliminate the restriction on the power of a district court to enjoin relitigation of a matter in a state court, as found by this Court in *Toucey* v. *N. Y. Life Ins. Co.*, 314 U. S. 118 (see Tit. 28 U. S. Code Congressional Service, p. 1969); and Section 36 of Public Law 773 expanded the power to review decisions of the Tax Court, to avoid the rule of *Dobson* v. *Commissioner of Internal Revenue*, 320 U. S. 489 (see Galston, *An Introduction to the New Federal Judicial Code*, 8 F. R. D. 201, 207).

[39] See Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution* (1945), 45 Col. L. Rev. 1, 24; Braucher, *The Inconvenient Federal Forum* (1947), 60 Harv. L. Rev. 908, 938-39; Note, *Forum Non Conveniens, A New Federal Doctrine* (1947), 56 Yale Law Journal 1234, 1249-50.

[40] See *Hearings Before Subcommittee No. 4, Committee on the Judiciary, House of Representatives, on H. R. 1639 (Jennings Bill), March 28, April 1, 11, and 18, 1947*, particularly the statement of Floyd E. Thompson, a member of the advisory committee on revision of Title 28: "It [this racket] is really stupendous, it is inconceivable to me that one honestly considering the question cannot see the evil and want to have it corrected. I think the opposition to the measure is almost exclusively from the racketeering lawyers themselves and from those with whom they divide the loot" (p. 24); see also *Alabama & Vicksburg Ry. Co.* v. *Journey*, 257 U. S. 111 (upholding orders of Director General of Railroads restricting venue in such suits during first World War), and *Davis* v. *Farmers' Coop. Equity Co.*, 262 U. S. 312, 315 ("* * * the resultant obstruction to commerce must be serious * * *"); Gray, *Venue of Actions* (1947), 33 Am. Bar Asso. Journal 659. DeVitt, *Venue of Actions* (1948), 34 Am. Bar Asso. Journal 454 (written prior to enactment of P. L. 773).

Congress (or the United States Attorney General, who was supplied with each successive draft and the final revision) was unaware of the intention expressed in Section 1404(a) or was in any way misled by it.

(2) The Government argues that if the revisers intended to cure the rule of the *Kepner* case and to subject all civil actions to the discretionary authority created by Section 1404(a), this would have been such a significant change that they would have warned Congress through a public statement of its effect or a more elaborate Reviser's Note (Brief, p. 28). While in reporting the bill whose first section contained an entire code of 2,680 sections, the House Report made only brief mention of the sixteen section venue chapter, it referred the Congress to the Reviser's Notes for a full explanation. Nothing could be more illuminating as to the change than the Reviser's Note which specifically refers to the *Kepner* case.

The common conception of the rule of the *Kepner* case is drawn from the following language in the opinion of Mr. Justice Reed in that case:

> "A privilege of venue, granted by the legislative body which created this right of action, cannot be frustrated for reasons of convenience or expense. If it is deemed unjust, the remedy is legislative * * *" (314 U. S. 44, 54).

The case established the rule that a court had no power to qualify the selection of venue where the legislative history of the particular special venue statute gave the plaintiff an absolute choice.[41]

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[41] *United States v. National City Lines, Inc.*, 334 U. S. 574, 596-97; see Braucher, *The Inconvenient Federal Forum* (1947), 60 Harv. L. Rev. 906, 926.

It would appear to be an act of supererogation to go beyond the Reviser's Note in demonstrating the change made by Section 1404(a). The first sentence stating that the section was drafted "in accordance with the doctrine of forum non conveniens" can only mean that the section is in furtherance of, or fully in keeping with, or in harmony with, the fullest development of the equitable doctrine. The second sentence refers to the "need" (or necessity or urgency) of the section by referring specifically to the *Kepner* case, in which the suit was prosecuted in New York "although the accident occurred and the employee resided in Ohio". Such a reference to the *Kepner* case would appear to be meaningless unless the section intended to devitalize the *Kepner* case.

If there could remain any doubt about the meaning of the second sentence of the Reviser's Note, it is dispelled by reference to the source of that sentence, the memorandum of Professor James W. Moore dated March 7, 1945, in which he first suggested codification of the doctrine of *forum non conveniens*. The fifth sentence of that memorandum states:

> "In my opinion the District Court for the Eastern District of New York should have had the power in the situation presented in the Kepner case, 314 U. S. 44, 62 S. Ct. 6, to transfer the action under the Federal Employer's Liability Act to a federal court in Ohio where the accident occurred and the employee resided and which would have been a proper venue." (See *Ante*, p. 10).

In the second edition of *3 Moore's Federal Practice*, which appeared in December, 1948, the author concludes his discussion of changes affecting venue, stating (¶19.04, p. 2141):

> "The Judicial Code Revision did not change the underlying basic principles of venue. It did, how-

ever, make some substantial changes and certainly put venue on a more workable basis. It adopts the principle of forum non conveniens, but provides for a transfer, not dismissal, of *any* action to a proper and more convenient forum."

Footnote 107 to this text states in part (p. 2141):

"Any action in §1404(a) includes suits subject to special venue statutes, as suits for patent infringement and suits under the Federal Employers' Liability Act, as well as actions subject to the general venue statute."

It is crystal clear that the revisers, the judicial and professional consultants, and the members of the Judiciary Committee of the House and Senate fully intended, in approving Section 1404(a) and the Reviser's Note, to cure the rule of the *Kepner* case—to eliminate the restriction upon the doctrine of *forum non conveniens* with respect to special venue statutes.

If, then, Section 1404(a) applies to Federal Employers' Liability Act actions, there is no basis, in logic or policy, for excluding from its application cases arising under other special venue statutes. Such an assumption would have the completely unwarranted effect of insulating from the transfer authority cases, for example, arising under the Securities Act of 1933,[42] the Securities Exchange Act of 1934,[43] the Public Utility Holding Company Act of 1935,[44] the Investment Company Act of 1940,[45] and certain suits in admiralty,[46] as well as civil actions brought under the antitrust laws, but permitting transfer of virtu-

[42] 15 U. S. C. A., Secs. 77a, 77v.
[43] 15 U. S. C. A., Secs. 78a, 78aa.
[44] 15 U. S. C. A., Secs. 79, 79y.
[45] 15 U. S. C. A., Secs. 80a, 80a-43.
[46] 46 U. S. C. A., Secs. 782, 1128d.

ally all other actions, including actions brought by the United States to collect taxes[47] or for imposition of penalties,[48] cases arising under the Federal Bankruptcy Act,[49] and federal criminal cases.

If Section 1404(a) has no application to actions arising under special venue provisions not included in Chapter 87, as argued by the Government, then, presumably, the provisions of Section 1406(a), as to the transfer of actions where venue was laid in the wrong division or district, could not be applied to such actions. Courts would have no power to transfer such cases to a proper forum; they would have no alternative but to dismiss them. Dismissal in such a case, at the least, would require starting an action all over again, and if the statute of limitations had run, meanwhile, it might be fatal to the claim. In view of the plain meaning of the language of Section 1404(a), and with due regard for the object of its enactment as evidenced by the Reviser's Note, it is believed that no such incongruous result can be countenanced.

(3) Under Section 6 of the Federal Employers' Liability Act[50] and under Section 12 of the Clayton Act, plaintiffs will continue to have the choice of venue according to the terms of those sections. But in these cases, as in all other civil actions, the district courts will have the authority, within the framework of Sections 1404 and 1406, to transfer the actions—whether for improper venue or for the convenience of parties and witnesses in the interest of justice—to another district. Superimposed upon the venue system

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[47] 28 U. S. C. A., Sec. 1396.
[48] 28 U. S. C. A., Sec. 1395.
[49] 11 U. S. C. A., Sec. 518.
[50] 45 U. S. C. A., Sec. 56.

in all civil actions, Section 1404(a) affects the place where an action shall be tried, but leaves unaffected the question of where an action shall be brought. There was no occasion expressly to repeal any special venue statute in this revision.

Dealing as the Court is here "not with an amending act but with an entire code revision", Judge Yankwich pointed out in the opinion transferring this action, "the doctrine of implied repeal need not concern us". The Government insists that the imposition of any conditions on the absolute venue privilege of the Government in antitrust cases is a *pro tanto* repeal of Section 12 of the Clayton Act. Such an argument disregards the new procedural concept upon which Section 1404(a) is founded.

C.

Civil Antitrust Actions Are Not Excluded from the Scope of Section 1404(a).

(1) The rationale of the *Kepner* case was the same as that of the *National City Lines* case previously decided by this Court—that in view of the legislative intent manifested by the history of the particular venue statutes there concerned, a court was precluded from applying the doctrine of *forum non conveniens*. A different and later legislative intent is expressed in Section 1404(a) and the legislative background which was the basis of the previous decisions by this Court in the *Kepner* and *National City Lines* cases is no longer operative. Thus, Section 1404(a) embraces antitrust actions for the same basic reason that it embraces actions under the Federal Employers' Liability Act.

The failure of the Revisers to refer to Section 12 of the Clayton Act does not in any way indicate an intention to

prohibit the broad application of Section 1404(a) to this class of cases. As we have pointed out, the reason for the reference to the *Kepner* case was that, during the period of the revision work and until the Spring of 1947, the *Kepner* case was the prime example before them of the principle sought to be changed by Section 1404(a). There had been no decision, either under Rule 21(b) as to criminal actions under the anti-trust laws, or under the doctrine of *forum non conveniens* as to civil actions under the anti-trust laws, which related to a transfer or a dismissal of such an action. When the District Court transferred the companion criminal action and dismissed the present civil action in the late summer and fall of 1947 it carried out the theory sought to be codified in Section 1404(a). There was, therefore, no occasion for a reference to Section 12 of the Clayton Act. It will be noted that the *Kepner* case was referred to merely "as an example".

The draft containing the section and the illuminating Reviser's Note was widely circulated in 1945, 1946 and 1947, and the proposed statute, together with the Reviser's Note, was submitted to Congress in April, 1947. If any Governmental agency found this section objectionable it had every opportunity, prior to its passage in June, 1948, to express its views.[51]

(2) The lower court in its companion opinion transferring the criminal case under Rule 21(b) of the Federal Rules of Criminal Procedure (which became effective

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[51] It appears that the Attorney General gave close attention to the progress of the revision, and made suggestions for changes and deletions. See letter of Hon. Tom C. Clark, Attorney General, to Hon. Earl C. Michener, Committee on the Judiciary, April 17, 1947 (Tit. 28 U. S. Code Congressional Service, p. 1700). See also, statement of Harold I. Boynton, Special Asst. to the Attorney General, before Subcommittee No. 1 of House Judiciary Committee. *Hearings* (*id.* at p. 1974).

March 21, 1946) reviewed at length the history of that rule and demonstrated that it was intended particularly to embrace antitrust actions. Surely it is not surprising that the present Congress should give effect in Section 1404(a) to the policy expressed in Rule 21(b).

The scheme of the revision of Title 28 was expounded by Hon. Eugene J. Keogh (Chairman of the House Committee on Revision of the Laws, which undertook the revision of Title 28) at the hearing before Sub-committee No. 1 of the House Judiciary Committee, March 7, 1947. In answer to a question as to why Titles 18 and 28 were selected for revision, he stated:

> "We selected 18 and 28, Mr. Chairman, for the reason that those were the two titles that by our experience and information cried out the loudest for a revision and for a restatement and for possible enactment into positive law, and we selected those two titles, too, particularly for the reason that there was pending under the acts granting the authority to the Supreme Court and its advisory committees, *the adoption of the rules of civil procedure and of criminal procedure, and we proceeded upon the hypothesis that the adoption of such rules would necessarily require substantive revision of the then existing laws.*"[52] (Emphasis supplied.)

The scrupulous care with which the revisers attempted to reconcile and adapt Title 28 of the Federal Rules of Civil and of Criminal procedure is clearly shown by reference to the Reviser's Notes throughout. There can be no doubt that the justice and desirability of Sections 1404 and 1406(a) as a broad counterpart of Federal Criminal Rules 19 to 21 (permitting transfer of criminal actions between districts and divisions) must have been recognized by the

[52] Tit. 28 U. S. Code Congressional Service, p. 1945.

revisers, the consultants and all the judges, legislators, United States Attorneys and interested members of the legal profession among whom the various drafts were circulated.[53] As Professor Moore pointed out (*ante*, p. 12), the sections were designed with reference to modern means of transportation, and in accordance with the provisions contained in the Federal Bankruptcy Act and state practice acts, clearly, we submit to bring the administration of justice in federal civil cases up to date.

(3) Section 1404(a) presents no hindrance to the enforcement of the antitrust laws. In *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, this court stated with respect to the doctrine of *forum non conveniens* (Justice Jackson, p. 508): "The doctrine leaves much to the discretion of the court to which plaintiff resorts, and experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses." Consistent with the standards laid down by this Court in the *Gulf* case, concerning application of the doctrine of *forum non conveniens*, the section gives the plaintiff a choice in which venue to bring an action, and the burden is on the defendant to show that a transfer is required "in the interest of justice."[54]

Our brief before this Court on the earlier appeal (p. 27) pointed out that in all other known antitrust cases in which an application was made to dismiss a suit on the grounds of *forum non conveniens*, the District Court decided, in its

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[53] See, for example, final portion of Reviser's note to Section 1404(b): "This revised subsection extends to all judicial districts and permits transfer of cases between divisions. Criminal cases may be transferred pursuant to rules 19-21 of the new Federal Rules of Criminal Procedure * * *" (Tit. 28 U. S. Code of Congressional Service, p. 1853).

[54] The standards laid down in the *Gulf* decision were followed in applying Section 1404(a) in *Richer* v. *Chi. R. I. & P. R. Co.*, 80 F. Supp. 974 (E. D. Mo., Nov. 19, 1948).

discretion, that the facts did not warrant the application of the doctrine. The order of transfer entered herein was made by a District Court (Judge Yankwich) which has always been very much concerned with the factors urged by the Government in antitrust cases and he recognized that a determination of what is in the interest of justice "imported the exercise of discretion which considers both the interests of the defendant and those of society".

The factors which this Court in the earlier *National City Lines* case found would interfere with the efficient administration of the antitrust laws, if the doctrine of *forum non conveniens* were applicable, are not a problem in the case of a transfer under Section 1404(a). Under the Federal Rules of Civil Procedure, a motion for transfer will have to be made at the same time as other preliminary motions.[55] The question of transfer will be heard along with such other motions, avoiding any additional delay, and whether granted or denied, such an order would not be appealable with the consequent delay of an appeal.[56] A great burden will rest upon the defendants to establish the necessity for a transfer. Once transferred a civil antitrust case will not go upon a merry-go-round of further transfers, but, under the law of the case, will undoubtedly remain in the district to which transferred. If in this district a crowded calendar is an obstacle to early trial, the Attorney General has

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[55] See Rule 12(g), (h), (b), Federal Rules of Civil Procedure.

[56] Appeals in civil antitrust actions wherein the United States is complainant lie from "the final judgment of the district court." (Section 17, Public Law 773; Tit. 28, U. S. Code Congressional Service p. 1644); see also *United States* v. *National City Lines, Inc.*, 334 U. S. 573, 594, and footnote 43.

power, by filing a certificate of public importance, to obtain an expedited hearing.[57] Finally, there will be involved, in the ordinary case, no disruption of the staff of the Department of Justice inasmuch as the files in a transferred matter can be transmitted to the United States Attorney in the new district for processing and trial as in a case initiated there.

Under Section 1404(a) the benefits intended by Section 12 of the Clayton Act are not endangered since the district courts are obliged to consider all the conveniences and other considerations of justice affecting such plaintiffs before making the findings necessary to found a transfer order. On the other hand, to whatever extent Section 12 of the Clayton Act may have been misused in the past or might be misused in the future, the very existence of Section 1404(a) will have a prophylactic effect and will, undoubtedly in large measure, eliminate the need for the transfer authority. Moreover, without the transfer authority of Section 1404(a), defendants in companion criminal and civil cases would be foreclosed from any real benefit under Federal Criminal Rule 21(b).

The applicability of Section 1404(a) to antitrust proceedings is required by the scheme and purpose of the revised Code. It will fairly serve the "interest of justice" in the extraordinary case where it may be appropriate, without interfering with a vigorous enforcement of the antitrust laws.

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[57] On filing of such a certificate, civil antitrust actions are to "be given precedence over others and in every way expedited, and be assigned for hearing at the earliest practicable day." (15 U. S. C. A., Sec. 28).

Conclusion.

The motion for leave to file a petition for certiorari should be denied.

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